

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS A. HARPER and DEPARTMENT OF THE ARMY,
ARMY NATIONAL GUARD, Charleston, W.Va.

*Docket No. 97-314; Oral Argument Held April 15, 1998;
Issued July 9, 1998*

*Appearances: Thomas A. Harper, pro se; Sheldon G. Turley, Jr., Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether appellant has met his burden of proof to establish that his loss of wage-earning capacity determination should be modified.

The Board finds that appellant's wage-earning capacity determination was erroneous and should be modified.

In the present case, appellant, a fuel distribution systems worker, sustained a recurrent incisional hernia as a result of a November 6, 1986 employment injury. Appellant returned to work on June 2, 1991 in a modified position. Appellant sustained another recurrent midline incisional hernia, which was accepted by the Office of Workers' Compensation Programs, on January 14, 1992. On November 3, 1992 the Office determined that appellant had been reemployed as a fuel distribution system worker, with wages of \$438.00 per week, effective June 2, 1991, and that his earnings in this position fairly and reasonably represented his wage-earning capacity. On February 3, 1993 appellant wrote to the Office advising that his earning in the position he performed from June 1991 through December 31, 1992 did not reasonably represent his wage-earning capacity. Appellant stated that while working in the position he again sustained hernia injury, and as a result his duties were restricted further. Appellant also noted that the position he was performing was temporary in nature and therefore his earnings in this position did not fairly represent his wage-earning capacity.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the

party attempting to show a modification of the wage-earning capacity award.¹ In the present case appellant is seeking modification of the November 3, 1992 wage-earning capacity determination on the grounds that the determination was erroneously issued.

This is the second appeal of this case. In the prior decision,² the Board remanded the case to the Office for a new evaluation as to whether the Office's November 3, 1992 wage-earning capacity determination was in error and should be modified. The Board noted that the evidence of record indicated that the fuel distribution system work position in which appellant was re-employed may have been specially modified for appellant and as such may have been a makeshift position; that the position may have been temporary in nature; and that the position may have exceeded appellant's work tolerance limitations. The Board remanded the case to the Office for further evaluation of the evidence to determine whether the position was in fact makeshift, temporary, or whether the position exceeded appellant's work tolerance limitations, and therefore whether the wage-earning capacity determination would have been erroneously issued. The Office denied modification of the November 3, 1992 wage-earning capacity determination by decision dated September 27, 1996.

Section 8115(1) of the Federal Employees' Compensation Act,³ titled "Determination of wage-earning capacity" states in pertinent part: "In determining compensation for partial disability, ... the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity...."

In this regard, the Board has stated that generally wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁴ Loss of wage-earning capacity is, however, a measure of loss of capacity to earn wages and not merely a measure of actual wages lost.⁵ Therefore actual wages are the preferred measure of wage-earning capacity only if they fairly and reasonably represent such capacity.⁶ The Board has explained that this view constitutes a natural extension of the general principle of workers' compensation law that wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, rather than in an artificial setting such as a make-shift position or other position at retained pay not necessarily reflective of true wage-earning capacity.⁷

¹ *Gregory A. Compton*, 45 ECAB 154 (1993).

² Docket No. 94-2142 (issued August 2, 1996).

³ 5 U.S.C. § 8115.

⁴ *Clarence D. Ross*, 42 ECAB 556 (1991).

⁵ *See Billy R. Beasley*, 45 ECAB 244 (1993).

⁶ *Michael E. Moravec*, 46 ECAB 492 (1995); *see also* 20 C.F.R. § 10.303(a).

⁷ *Id.*

Therefore, while the Office's procedures require that the claims examiner determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity after the claimant has been working in a position for 60 days,⁸ actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.⁹ In the present case, the Office did not properly evaluate the contrary evidence of record that appellant's earnings in his modified fuel systems worker position did not fairly and reasonably represent his wage-earning capacity.

In evaluating whether actual earnings fairly and reasonably represent wage-earning capacity, the Board has previously considered such factors as whether the earnings are from a makeshift position designed for a claimant's particular needs,¹⁰ whether the position was temporary or seasonal in nature,¹¹ and whether the medical evidence indicates that the claimant's work tolerance limitations are exceeded by the requirements of the position.¹² Appellant, in requesting that the Office modify the wage-earning capacity determination, has cited these factors in support of his argument that the wage-earning capacity determination was made in error.

An employing establishment official has testified that the fuel distribution system worker position was created and tailored for appellant's specific needs, through a "pipeline funding" program, which essentially reemployed workers' compensation recipients in work hardening positions. The employing establishment official testified that "pipeline funding," in essence, was a program which allowed agencies to bring back or to reduce the number of long term compensation recipients from their rolls and bring them back into a meaningful program, work hardening type program, to get them acclimated back into the work environment and...and to ultimately find them a full-time position with the agency." The employing establishment official also testified that after May 1992 appellant's physician placed further restrictions on appellant's performance of the physical requirements of the position, including climbing. The employing establishment official testified that essentially appellant should have been removed from duty as of May 1992 as he could no longer perform the duties of the modified position. By letter dated March 16, 1994, the employing establishment again advised the Office that, "with the medical restrictions placed on [appellant] by his physician, this office feels that [appellant] cannot perform either the WG 8 (the position he was first hired into) or the WG 5 (the position that was created)."

Make shift work is work which is specifically designed for a claimant's particular abilities and needs.¹³ The evidence of record establishes that appellant's position was created to

⁸ Federal (FECA) Procedure Manual, Chapter 2.814.7, Part 2 -- Claims (April 1995).

⁹ See *Mary Jo Colvert*, 45 ECAB 575 (1994).

¹⁰ *James D. Champlain*, 44 ECAB 438 (1993).

¹¹ *Id.*

¹² *Mary Jo Colvert*, *supra* note 9.

¹³ See *Elizabeth E. Campbell*, 37 ECAB 224 (1985)

remove appellant from the OWCP compensation rolls and was specifically modified for appellant's needs. After appellant's recurrent hernia sustained in January 1992, his day to day duties were again modified as he was unable to perform even the modified position. The evidence of record is sufficient to find that appellant's modified position was makeshift in nature. It was therefore error for the Office to find on November 3, 1992 that appellant's earnings in the modified fuel systems worker position fairly and reasonably represented appellant's wage-earning capacity.

The evidence of record also establishes that the modified fuel systems worker position created through pipeline funding was temporary in nature. An employing establishment memorandum dated January 26, 1989 of record substantiates that to reduce the accelerating costs of the OWCP compensation rolls, the Air Force "Pipeline Reemployment Initiative" would provide funding to reemploy technicians for at least one year, during which time every effort should be made to find full time employment, if other employment was thereafter not available, and second year funding was approved "pipeline" employment would be continued, otherwise the employee would be returned to OWCP compensation rolls. A memorandum of record dated April 11, 1991 from the employing establishment's Office of the Adjutant General states that a proposed position of fuel distribution system worker would be created for appellant with an effective date of June 2, 1991, with funding to be provided through October 1991. The employing establishment informed the Office by letter dated December 18, 1992 that appellant was employed under temporary "pipeline funding," and that effective December 31, 1992 the funding would expire and appellant's position would be terminated. A notification of personnel action dated December 18, 1992 also states that appellant's position was terminated due to loss of temporary pipeline funding. In a memorandum to the Office dated February 9, 1993, the employing establishment's OWCP specialist advised that appellant's position was a "temporary funded, temporary position that was modified for appellant..." An employing establishment official has also testified that "pipeline funding" was not permanent employment" and that appellant was reemployed through a temporary program. The plethora of evidence therefore establishes that the modified position created for appellant was not created as a permanent position, but rather was merely intended to be a temporary position, with temporary funding. Given the circumstances of this case, the evidence does establish that appellant was reemployed in a temporary position and that his earnings in this position did not fairly and reasonably represent his wage-earning capacity.

Finally, the Board also finds that as of November 3, 1992, the date the Office performed the wage-earning capacity determination, appellant's medical restrictions exceeded the requirements of the modified position. The Board notes that the position description provided for the position of fuel distribution system worker, as of June 1991 when appellant accepted the modified position, indicated that the physical requirements of the position included standing, climbing, working in strained positions and lifting objects up to 10 pounds in weight. On February 12, 1992 appellant underwent surgical reduction repair of an incarcerated midline recurrent incisional hernia, performed by Dr. Gerald T. Golden. On March 6, 1992 Dr. Golden informed the Office that appellant had an ongoing problem with weakness of the anterior abdominal musculature and recurrent incisional hernia. Dr. Golden stated, "I believe that he would benefit from a career change to wit a less physical job. He should do no climbing, [and] lift nothing more than 10 pounds. Vigorous pushing and pulling would also be forbidden in such

a new avocation.” On April 7, 1992 Dr. Golden released appellant to return to light duty, with the added restrictions of no climbing and no work in a cramped position. Evidence elicited from the employing establishment also supports a finding that after appellant’s return to work in April 1992, appellant was no longer performing the duties of the modified position but rather was performing ad hoc sedentary work due to his physical restrictions.

On appeal the Director of the Office has asserted that because appellant had the medical ability to perform the modified position for a period of time after June 1991, his medical inability to perform the position after February 1992 is irrelevant. The Office in this case determined appellant’s wage-earning capacity as of November 3, 1992. The medical evidence does not establish that appellant was physically able to perform the modified position as of November 1992. Furthermore, the medical evidence establishes that appellant sustained an accepted midline incisional hernia on January 14, 1992, necessitating surgical repair on February 12, 1992. Dr. Golden has stated that this hernia was recurrent of the previously accepted hernia. In determining wage-earning capacity, the Office is always required to evaluate, even in a request for modification of a wage-earning capacity determination, whether there has been a material change in the nature and extent of the injury-related condition.¹⁴ If a material change in the injury-related condition has occurred, the Office must determine whether this affects appellant’s wage-earning capacity.

The evidence of record establishes that the fuel distribution system worker position was created with special modifications for appellant as a work hardening position and was makeshift in nature. The evidence also establishes that appellant’s modified position was created as a temporary position. Furthermore, the medical evidence of record provided by Dr. Golden establishes that, at least as of April 1992, the requirements of the modified position exceeded appellant’s work tolerance limitations. The Board concludes that appellant has met his burden of proof to establish that the Office’s November 3, 1992 wage-earning capacity determination was in error as appellant’s actual earnings did not fairly and reasonably reflect his wage-earning capacity.

¹⁴ See *Don J. Mazurek*, 46 ECAB 447 (1995).

The decision of the Office of Workers' Compensation Programs dated September 27, 1996 is hereby reversed.

Dated, Washington, D.C.
July 9, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member